United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1284

To be argued by
MICHAEL HARTMERE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1284

BP/S

UNITED STATES OF AMERICA,

Appellant,

—v.—

SYLVIO J. GRASSO,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLANT

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TITLE 26, UNITED STATES CODE

§ 7201. Attempt to evade or defeat tax

Any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

United States Constitution, Amendment V

> . . . [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . .

United States Court of Appeals

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Docket No. 76-1284

UNITED STATES OF AMERICA,

Appellant,

—v.—

SYLVIO J. GRASSO,

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BRIEF FOR THE APPELLANT

Statement of the Case

On April 16, 1975, a Federal Grand Jury sitting at Hartford, Connecticut, returned a true bill of indictment (H-75-52) charging the defendant, Sylvio J. Grasso, with violation of Title 26, United States Code, Section 7201, in three counts. The indictment charged that the defendant had knowingly and wilfully attempted to evade and defeat a large part of his income tax liability for the years 1969, 1970 and 1971.

On April 28, 1975, the defendant entered pleas of not guilty to all three counts of the indictment.

A jury was empanelled and sworn on November 5, 1975, and trial by jury commenced on November 6, 1975, in United States District Court, Hartford, before the Honorable T. Emmet Clarie Chief United States District Judge. On November 26, 1975, the Court declared a mistrial, *sua sponte.*

On January 6, 1976, the case appeared on a jury assignment calendar for the United States District Court, New Haven, before the Honorable Robert C. Zampano, United States District Judge. On January 7, 1976, defendant filed his memorandum in support of dismissal of indictment on grounds of double jeopardy. On February 11, 1976, oral arguments were heard on defendant's motion to dismiss, after which Judge Zampano reserved decision.

On May 13, 1976, Judge Zampano granted defendant's motion to dismiss. Thereafter, a timely Notice of Appeal was filed.

Questions Presented

1. Did the trial court act within permissible bounds of its discretion in declaring a mistrial, *sua sponte?*

2. Did the defendant impliedly consent to the declaration of a mistrial by the trial court by otherwise seeking termination of the jury trial?

Statement of Facts

The jury trial on charges that the defendant, Sylvio J. Grasso, attempted to evade and defeat a large part of his income tax liabilities for each of the years 1969, 1970, and 1971 began on November 6, 1975. (Tr. 2).*

The theory of the Government's case was the net worth plus non-deductible expenditures method of proof. Through the use of this method, special agents of the

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* References marked "(Tr.)" refer to the transcript of proceedings in the trial court before the Honorable T. Emmet Clarie, Chief United States District Judge.

Intelligence Division and revenue agents of the Internal Revenue Service had reconstructed the defendant's income for years 1969, 1970, and 1971. The starting point of the Government's case was December 31, 1968. (Tr. 696-697). Having utilized the net worth theory of proof, it was incumbent on the Government to show, in addition to a substantial accretion in net worth, either a likely source of income from which the jury could reasonably find that the net worth increase arose, or the non-existence of non-taxable sources of income during the prosecution years.

The Government clearly showed at least two likely sources of income from which the defendant's increases in net worth could have arisen. First, the Government proved that there could have been accretions to the defendant's net worth through the defendant's operation of his bailbonding business. (Tr. 155-160, 176-178, 607-608, 612-615, 656-657). Second, through the witness, Daniel H. Harris, the Government showed another likely source of income to be the defendant's involvement in the illicit narcotics trade during 1970. (Testimony of Daniel H. Harris, Jr. on November 11, 1975, pp. 2-29; Excerpt Of Bench Conference, In The Absence Of The Jury And Testimony Of Daniel H. Harris, Jr., Before The Jury, On November 12, 1975, pp. 5-120).* It was the subsequent inconsistent statement or "recantation" of his trial testimony by Harris to defense counsel which ultimately led to the trial court's declaration of a mistrial. Harris' statement and the surrounding circumstances will hereinafter be dealt with more fully.

The Government's final witness, Bruno Lukas, an Internal Revenue Agent for over fourteen years summa-

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* Transcripts of testimony transcribed under separate headings are identified according to the transcript title throughout this brief.

ized the various exhibits and testimony which had been presented to the jury during the presentation of the Government's case in chief. (Tr. 691-796). Agent Lukas, the Government expert, determined the pertinent figures for the prosecution years to be as follows:

TAXABLE INCOME

	1969	*1970*	*1971*
Taxable Income Per Return:	$45,661.	$55,350.	$16,646.
Taxable Income Computed:	59,799.	71,162.	79,156.
Additional Taxable Income:	14,138.	15,812.	62,510.

TAX LIABILITY

	1969	*1970*	*1971*
Tax Liability Per Return:	$ 9,184.	$15,057.	$ 3,729.
Tax Liability Computed:	12,475.	22,275.	31,408.
Additional Tax Due:	3,291.	7,218.	27,679.

(Tr. 759-761).

After almost six full days of presenting evidence to the jury, the Government, having called thirty-nine witnesses, rested its case in chief at approximately 3:13 p.m. on November 14, 1975. (Tr. 796)

The defendant began presenting evidence on November 14, 1975. After approximately three days of testimony before the jury, during which the defendant, his accountant, and seven other witnesses testified, the defendant rested his case on November 20, 1975 at approximately 3:24 p.m. (Proceedings of November 20, 1975, p. 37). Thereafter on November 20, 1975, the Government called three rebuttal witnesses and court was adjourned at approximately 5:00 p.m. (Proceedings of November 20, 1975, p. 103). In total, the jury had heard nine days of testimony concerning the case.

On Friday morning, November 21, 1975, Mr. Henry B. Rothblatt, attorney for the defendant, related to the

court in chambers and later in open court, the jury having been dismissed for the day, that the Government witness, Daniel H. Harris, had contacted Mr. Rothblatt after court on November 20, 1975. (Tr. 906-907). Mr. Rothblatt visited Harris at the Seyms Street Jail, Hartford, after speaking with Harris on the telephone. (Tr. 907). At the Seyms Street Jail, Mr. Harris was interviewed by Attorney Rothblatt who tape recorded the conversation. After playing the tape recording for Chief Judge Clarie in chambers, Attorney Rothblatt moved to dismiss the indictment on the grounds of prosecutorial and Government misconduct. (Tr. 907-908). In the interview with Attorney Rothblatt, Mr. Harris told Mr. Rothblatt that the defendant never dealt with him (Harris) in narcotics (App. p. 46),* that he (Harris) had told a special agent of the Internal Revenue Service that he didn't want to testify at the trial whereupon the agent had threatened Harris with a perjury prosecution and parole revocation (App. p. 58), and that the prosecuting attorney had threatened him with a perjury prosecution if he did not testify against the defendant. (App. p. 59).

After hearing the tape recording in chambers and Attorney Rothblatt's oral argument in open court concerning Government and prosecutorial misconduct, Chief Judge Clarie ordered a complete hearing on the matter in the absence of the jury. (Tr. 915). This hearing was conducted on November 21 and November 25, 1975. During the hearing on defendant's motion to dismiss, Daniel H. Harris was recalled to the witness stand as a court witness. Mr. Harris invoked his Fifth Amendment privilege against self-incrimination as to each and every question concerning the circumstances surrounding the interview with Attorney Rothblatt, the substance of the interview,

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* References marked "(App. p.)" refer to Appellant's Appendix to this brief.

the alleged threats by Government agents, and his dealings with the defendant in narcotics. (Transcript Of Testimony On November 21 And 25, 1975 In The Absence Of The Jury, pp. 2-24).

Facts developed during the court's hearing showed that the "recanting" witness, Daniel H. Harris, told three special agents of the Intelligence Division, Internal Revenue Service, that the tape recorded statement given to Attorney Rothblatt was a total lie and induced by threats. (Transcript Of Testimony On November 21 And 25, 1975 In The Absence Of The Jury, pp. 159, 173, 286-288, 307-308). Harris had told the agents that his statement to Attorney Rothblatt was a lie within two hours after having given the statement to Attorney Rothblatt. (Transcript Of Testimony On November 21 And 25, 1975 In The Absence Of The Jury, pp. 155; 285).

After having listened to almost two full days of testimony on November 21 And November 25, 1975, out of the presence of the jury, concerning all Government interviews of Harris, the circumstances surrounding his "recantation" to Attorney Rothblatt, the circumstances surrounding his statement to Government agents that his statement to Attorney Rothblatt was false, and Harris' prior sworn testimony, both during the trial and before two different Federal Grand Juries to the effect that the defendant had been engaged in narcotics trafficking, Chief Judge Clarie denied defendant's motion to dismiss based on prosecutorial and Government misconduct. (App. p. 33). However, Chief Judge Clarie declared a mistrial, *sua sponte*. (App. p. 33).

The Government immediately opposed the Court's declaration of a mistrial. (App. p. 35). Attorney Rothblatt stated: "Of course, your Honor, the defendant agrees with everything that your Honor has decided, except your

Honor's decision to declare it a mistrial, we would renew our request for judgment of acquittal." (App. p. 35).

In declaring the mistrial, Chief Judge Clarie specifically found that there had been neither prosecutorial nor Government misconduct involved in any of the circumstances surrounding the testimony of Daniel H. Harris, or in the use of Daniel H. Harris as a Government witness. (App. p. 33).

Thereafter the case was assigned to the Honorable Robert C. Zampano, United States District Judge, for retrial. On January 7, 1976, the defendant filed his Memorandum in Support of Dismissal of Indictment on Grounds of Double Jeopardy. Supporting memoranda having been filed and oral argument by both sides heard, Judge Zampano issued a written decision on May 13, 1976, dismissing the indictment on grounds of double jeopardy. [App. p. 9; see also *United States* v. *Grasso*, 413 F. Supp. 166 (D. Conn. 1976)].

It is Judge Zampano's decision dismissing the indictment in this case on grounds of double jeopardy which is the subject of this appeal.

ARGUMENT

I.

The Trial Court Acted Within Permissible Bounds of its Discretion in Declaring a Mistrial, *sua sponte*.

The Fifth Amendment's double jeopardy clause operates to protect a person from being twice subjected to the hazards of a trial. *United States* v. *Dinitz*, — U.S. —, 96 S.Ct. 1075 (1976). Jeopardy is generally held to attach when a defendant is put to trial before the trier

of facts, whether the trier be a jury or a judge. *United States* v. *Jorn*, 400 U.S. 470, 480 (1971).

The principles which have guided Federal courts in the application of the concept of double jeopardy to situations giving rise to mistrials were stated by Mr. Justice Story as follows:

> "We think that in all cases of this nature the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a *manifest necessity for the act, or the ends of public justice would otherwise be defeated.* They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the judges, under their oaths of office." (Emphasis supplied).
>
> *United States* v. *Perez*, 9 Wheat. 579, 580 (1824).

In situations where mistrials have been declared *sua sponte* by the trial judge, the United States Supreme Court has consistently refused to establish any sort of strict regulatory standards for the application of the double jeopardy clause. *Wade* v. *Hunter*, 336 U.S. 684, 690 (1949). The Supreme Court has instead examined each case on its own merits. Whether or not a mistrial

wa. necessary in the present case, then, calls for an investigation of the facts, bearing in mind the various interests of the parties and the public. Often a defendant's interest in having his trial concluded by the same tribunal before which it began must be subordinated to the public's interest in achieving fair trials. *Wade* v. *Hunter*, *supra*, at 689; *Illinois* v. *Somerville*, 410 U.S. 458, 463 (1973).

Chief Judge Clarie presided over all proceedings during the trial of the present case. Daniel H. Harris, called as a Government witness, testified under oath that he (Harris) had sold heroin for the defendant Grasso and that he did so as the request of the defendant. (Testimony of Daniel H. Harris, Jr. On November 11, 1975, pp. 12-13; 24). Harris had previously given a sworn statement to County Detectives, Hartford County, Connecticut, to the same effect, (Court Exhibit A-2), and had reaffirmed under oath his narcotics transactions with the defendant Grasso before two different Federal Grand Juries sitting in Hartford. (Court Exhibit A-1; Transcript Of Testimony On November 21 and 25, 1975 In The Absence Of The Jury, pp. 224-225). Subsequent to being called as a Government witness during the trial, Harris told Attorney Rothblatt that his testimony concerning the defendant's narcotics transactions was false. (App. p. 46). Two hours later, Harris told three Federal agents that his tape-recorded st[illegible]ment to Attorney Rothblatt was a total lie. (Transc[illegible]Of Testimony On November 21 And 25, 1975 In The Absence Of The Jury, pp. 159, 173; 266-288; 304-308). Chief Judge Clarie ordered a complete hearing on defendant's motion to dis miss on grounds of prosecutorial and Government misconduct in order to determine the truth. (Tr. 915). However, when called as a court witness during this hearing, Harris invoked his Fifth Amendment privilege as to narcotics transactions with the defendant and as to questions concerning his tape-recorded statement to Attorney Rothblatt. (Transcript Of Testimony On November 21 And 25 In The Absence Of The Jury, pp. 2-24).

Chief Judge Clarie, having presided over the entire trial, which had to that point consumed nine days of presenting evidence to the jury and two days of hearing on defendant's motion to dismiss, then had to decide defendant's motion. Judge Clarie denied defendant's motion to dismiss, but, alluding to Harris' contradictory statements, declared a mistrial, *sua sponte*. (App. p. 33).

In declaring a mistrial, Judge Clarie stated:

> "The Court has, as counsel may well imagine, has given considerable thought to this problem that has arisen. I never had the question arise in this form during a trial before.
>
> "But the Court is of the opinion that because of the perjury issue injected into the trial by the testimony of Daniel Harris, that the defendant Grasso can not get a fair and impartial trial under the present circumstances.
>
> "If the issue went to the jury it would not be whether or not he failed to pay his income taxes; the issue would be of selling narcotics, which is in and of itself a kind of abhorrent business to most every one of us. The issue would become whether or not he was selling narcotics, and whether or not this man, Daniel Harris, would be believed.
>
> "To do that we'd have to go 'way back to the statement to the three Hartford policemen and the County Detective in '71, and get the facts as to how the story originated, with the documents which are in evidence. And we'd have to begin to review the testimony before the grand jury that Mr. Buckley deduced when he was prosecutor, or assistant prosecutor.
>
> "We'd have to review the tape, as has been filed in evidence by counsel, which he procured at the jail.

> We'd have to review the statement of the I.R.S. witnesses, who went over and received from him what is claimed to be an apparent contradiction of the tape.
>
> "And the issue of Mr. Grasso's income tax evasion would be well lost in the question of whether or not Daniel Harris committed perjury. That would be the nub of the case, rather than the question of the defendant's failure to pay his income taxes.
>
> "For this reason the Court is of the opinion that the motion to dismiss would be denied, but that a mistrial should be ordered, because there is a manifest necessity for declaring a mistrial. Otherwise, the ends of justice, public justice, would be defeated.
>
> "And that is what the Court is going to do. The Court is of the opinion that to permit the trial to go forward under the present circumstances would be an injustice to Mr. Grasso." (App. p. 31-33).

From Judge Clarie's language in declaring a mistrial, it is obvious that the mistrial was declared in the sole interest of the defendant. Judge Clarie's ruling clearly shows that the Court was acting solely to insure that the defendant had a fair and impartial trial, and that the guilt or innocence of the defendant on tax evasion charges would not be subordinated in the jury's deliberations to the bizarre circumstances which arose after the witness had testified. In a case where the presiding judge, on his own motion and with neither approval nor objection by the defendant, declared a mistrial, the United States Supreme Court, in upholding the Government's right and duty to retry the defendant, stated:

> "Where, for reasons deemed compelling by the trial Judge, who is best situated intelligently to

> make such decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment. . . Suffice that we are unwilling, where it clearly appears that a mistrial has been granted in the sole interest of the defendant, to hold that its necessary consequence is to bar all retrial."

Gori v. *United States*, 367 U.S. 364, 368, 369 (1961).

Judge Zampano, in granting defendant's motion to dismiss on grounds of double jeopardy, overruled the Government's argument that the mistrial was declared in the sole interest of the defendant. However, in so ruling, Judge Zampano also overruled or second guessed Judge Clarie, who was best situated intelligently to make such a decision. *Gori* v. *United States*, *supra* at 368; see also *United States* v. *Williams*, 411 F. Supp. 854 (S.D.N.Y. 1976). The Government submits that Chief Judge Clarie's comments in declaring a mistrial emphatically demonstrate that his concern that the defendant receive a fair trial on charges of income tax evasion was the sole reason for declaring the mistrial. (App. pp. 31-41). Traditionally, the trial judge has been afforded wide discretion in determining when to declare a mistrial due to recognition that the trial judge generally is the person most familiar with the facts of the case. *Illinois* v. *Somerville*, *supra*, at 462; *United States* v. *Beckerman*, 516 F.2d 905 (2d Cir. 1975). Moreover, it is also the trial judge who must insure that the jury receives all of the relevant facts in a case, presented in a clear and straightforward manner. *United States* v. *Nazzaro*, 472 F.2d 302, 313 (2d Cir. 1973). The Government submits that Judge Clarie's comments conclusively show that he properly exercised his discretion in declaring a mistrial

since he had determined that an impartial verdict could not be reached by the jury. *Illinois* v. *Somerville*, *supra*, at 464. In an analogous situation where a prosecution witness made a prejudicial remark, unexpectedly, it was held that the trial judge properly declared a mistrial under the doctrine of manifest necessity. *Conner* v. *Deramus*, 374 F. Supp. 504, 509 (M.D. Pa. 1974).

The present case involves neither Government misconduct nor Government unpreparedness. In *United States* v. *Glover*, 506 F.2d 291 (2d Cir. 1974), the Government failed to recognize a *Bruton* problem prior to trial and in order to proceed at trial was forced to move to sever and for a mistrial. There, it was held by this Court that the double jeopardy clause of the Fifth Amendment barred retrial. In *McNeal* v. *Hallowell*, 481 F.2d 1146 (5th Cir. 1972), the prosecution had two witnesses, one of whom told a different story on the witness stand and the second of whom invoked the Fifth Amendment unexpectedly. The Court of Appeals for the Fifth Circuit applied the rules stated in *Illinois* v. *Somerville*, *supra*, and found that the question of whether an impartial verdict could be reached was clearly not an issue in that case. In each of these cases, a mistrial was declared solely for the benefit of the prosecution.

The present case is clearly distinguishable from the above-cited cases of Government unpreparedness. Here, the witness Harris had testified at trial consistently with his three prior sworn statements. It was only some eight days after his trial testimony that Harris made an inconsistent statement to Attorney Rothblatt. (Tr. 906). Clearly, the Government in this case had no way to anticipating that this witness would change his testimony eight days after his trial testimony. Judge Clarie specifically found that the Government could not have anticipated the circumstances which arose subsequent to

Harris' trial testimony, stating: "But to say that the Government knew he was not truthful and put him on notwithstanding that, I think would be an unfair accusation." (App. p. 33).

Moreover, the trial court specifically found that there was neither prosecutorial nor Government misconduct involved: "The Court can not find that there was improper conduct on the part of the prosecutor, or as far as the Government agents or investigators are concerned." (App. p. 33).

Judge Zampano's opinion that the Government benefitted from the declaration of the mistrial by being given additional time "to retrench, to reconstruct its evidence, and to present its case against the defendant for the year 1970 without the tainted Harris testimony", (App. p. 20), is simply not supported by the facts. While the Government was required to prove a likely source of additional income to the defendant in this net worth case, *Holland* v. *United States* 348 U.S. 121 (1954), or the non-existence of no-taxable income during the prosecution period, *United States* v. *Massei*, 355 U.S. 595 (1958), the Government had done so during the presentation of its case in chief without the testimony of Harris. Clearly, the jury could have reasonably found, and the Government would have argued, that a likely source of unreported income to the defendant for all three prosecution years arose from the defendant's operation of his bail bonding business. (Tr. 155-160, 176-178, 607-608, 612-615, 656-657). Additionally, the Government could have argued that the defendant received unreported income from various real estate transactions and other investments. Harris testified only as to the year 1970. (Testimony Of Daniel H. Harris, Jr. On November 11, 1975, pp. 2-29). Any argument that the Government benefited from the declaration of the mistrial is, therefore, speculation, since the Government had presented ample evidence

on all essential elements of the crimes charged during its case in chief.

The Government submits that this case should be decided according to the rationale enunciated by the Supreme Court in *Gori* v. *United States*, *supra*. In the present case there was neither judicial overreaching, Government misconduct, nor Government error. Judge Friendly, in affirming re-prosecution despite defendant's double jeopardy claim, recently wrote for this Court: "The facts are indistinguishable from *Gori*, and even if we take that decision as having been qualified by *Jorn* in a manner not wholly eradicated by *Somerville*, this case falls within the *Gori-Jorn* composite standard of lack of abuse of discretion in declaring a mistrial because of an inadvertent error of the prosecutor and benefit to the defendant as the sole motivation." *United States* v. *Gentile*, 525 F.2d 252, 257 (2d Cir. 1975), *cert. denied*, — U.S. —, 96 S. Ct. 1493 (1976).

Applying the facts of the present case to the guidelines established in *Gori*, the trial judge acted properly within his discretion in declaring a mistrial and the decision of the District Court dismissing the indictment on grounds of double jeopardy should be reversed.

II.

The Defendant Impliedly Consented to the Declaration of a Mistrial by the Trial Court by Otherwise Seeking Termination of the Jury Trial

The Government does not contend that defendant in this case specifically moved for a mistrial. In such cases it has been held that retrial is not barred by the double jeopardy clause. *United States* v. *Tateo*, 377 U.S. 463, 467 (1964). The defendant did, however, move to dis-

miss the indictment on grounds of prosecutorial and Government misconduct on the tenth day of trial, thereby specifically seeking the termination of the jury trial. Subsequent to the Court's declaration of a mistrial out of the presence of the jury but prior to the jury's being discharged, defendant never expressed any "interest in having his fate determined by the jury first impanelled". *Illinois* v. *Somerville, supra,* at 471.

After the trial court had announced its decision to declare a mistrial, defendant's attorney stated: "Of course, your Honor, the defendant agrees with everything that your Honor has decided, except your Honor's decision to declare it a mistrial, we would renew our request for judgment of acquittal." (App. p. 35). The Government maintains that the defendant did not expressly consent to the declaration of a mistrial because he preferred the more drastic remedy of dismissal or a judgment of acquittal. In a recent case where a mistrial was *erroneously* declared by the trial court, *sua sponte*, it was held that retrial of a defendant is not barred by the double jeopardy clause of the Fifth Amendment where there was no abuse of judicial discretion:

> "Weighing, as we must, the competing interest of the defendant in having 'his trial completed by a particular tribunal . . . [and] the public's interest in fair trials designed to end in just judgments', we have concluded that in this instance the contention of double jeopardy must be rejected. The trial Judge's ruling can scarcely be characterized as 'erratic' or made in circumstances disclosing a plain lack of discretion, as his decision was arrived at only after the defendant had vigorously urged a violation of the Brady principal. Moreover, while the defendant did not expressly consent to a mistrial-preferring the more drastic remedy of dismissal—at no time did his counsel draw to the

> attention of the Court 'the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate' (Cite omitted). In fact, his attitude was such that it was not until filing his answering brief on appeal that he set any store upon a 'valued right' to completion of the trial by the first jury." *United States* v. *Sedgwick*, 345 A.2d 465, 473 (D.C. Ct. App. 1975).

Thus, in the present case, having failed to persuade the trial court that the drastic remedy of dismissal was warranted but having succeeded in convincing the trial court that circumstances appropriate to the declaration of a mistrial were present, defendant should not now be allowed to argue that it was error for the trial court to grant the termination of the trial which defendant obviously sought, albeit in a different fashion.

Additionally, the Government presented evidence to Judge Zampano, who was to decide the double jeopardy issue, to the effect that the defendant had reason to believe that Harris would "recant" his trial testimony as to the defendant and that defendant was in possession of this information approximately two months prior to the trial of this case. (App. pp. 103-107). Harris and another individual had been interviewed in a Connecticut prison by an attorney from the firm representing the defendant in this case and also in a civil action filed by the defendant against Federal and State drug law enforcement officials and prosecutors. (App. p. 103). During the interview, Harris stated that he had been visited in June, 1975 by an Assistant United States Attorney and two Treasury Department agents who questioned him about various transactions with the defendant including narcotics transactions. (App. pp. 106-107). Contained with-

in the attorney's memorandum of the interview is the following paragraph:

> "They took Harris to a courtroom on Main Street in Hartford. They told him it was a Grand Jury investigating Grasso. Harris was questioned under oath. He was asked to confirm a statement that he had given to Connecticut detectives in 1971. (See below). They also asked if Grasso dealt in narcotics. 'Yes'. (Harris admits that this was a lie)" (App. pp. 106-107).

On the day before the above interview of Harris (September 9, 1975), another inmate had been interviewed at the prison by the same attorney. That inmate told the attorney that he "thought that Harris would sign a statement after his parole hearing scheduled for the end of September." (App. p. 105).

Judge Zampano, in dismissing the indictment in this case, did not comment on these facts, which had been submitted to him prior to his decision. Judge Zampano did, however, "reject the government's contention that there was an implied consent to the mistrial", but apparently based his decision merely on defendant's motion to dismiss on grounds of Government misconduct and never considered defendant's prior knowledge of the witness Harris. (App. pp. 17-18).

This memorandum of an interview with Harris, which had been turned over to the Government by Attorney Rothblatt, was filed by the Government in connection with the motion to dismiss the indictment which was then pending before Judge Zampano. Attorney Rothblatt responded to this memorandum, and stated in an affidavit that the interviews conducted by his staff member were in preparation for *Sylvio Grasso* v. *Peter Gruden, et al*, Civil No. H-74-194 (United States District

Court, District of Connecticut). (App. pp. 112-114). The Government certainly does not here question the truthfulness of Attorney Rothblatt's affidavit.

However, it is important to note that this civil action was brought by the defendant Grasso against State, local, and Federal drug officials and Federal prosecutors for events surrounding the arrest of the defendant for drug violations in 1972. The interview of Harris by Attorney Rothblatt's staff member reflects that Harris was visited by Treasury agents and an Assistant United States Attorney in June, 1975, that Harris was questioned by Treasury agents concerning the defendant's bonding business and the sale of a car to defendant, and that Grand Jury testimony was given in 1975 concerning defendant's involvement in narcotics. (App. pp. 106-107).

Moreover, during the trial of this case, on November 12, 1975, a question arose as to whether Harris and previously been interviewed by a member of Attorney Rothblatt's office. Attorney Rothblatt stated that his associate had been unable to interview Harris prior to trial. (Tr. 452). When asked if he had a written report from his associate concerning Harris' refusal to be interviewed, Attorney Rothblatt responded that the defendant had verified Harris' refusal to be interviewed, but that he (Attorney Rothblatt) would telephone his associate to be sure. (Tr. 453-454). The "recantation" to Attorney Rothblatt was given on November 20, 1975. (Tr. 906-907).

The Government submits that defendant's conduct in this case should be carefully scrutinized by this Court, as was the Government's conduct by Judge Clarie in a two-day hearing. This Court has demonstrated that it will carefully scrutinize the conduct of a defendant which may have led to the declaration of a mistrial where the defendant later seeks the protection of the double jeopardy

clause. *United States* v. *Gentile, supra.* There, Judge Friendly stated: "While LaPonzina's counsel may not have consented to the declaration of a mistrial, he had heavily contributed to stimulate the Judge's concern." *United States* v. *Gentile, supra* at 255.

Here, there is no question that defendant's motion to dismiss and evidence adduced pursuant thereto served to stimulate Judge Clarie's concern that the defendant might not receive a fair trial. (App. p. 33). Additionally, if the defendant had knowledge during the trial that the witness Harris had previously given an inconsistent statement but failed to cross-exmaine Harris with that statement as a matter of trial tactics, he should not now be allowed to claim double jeopardy. *United States* v. *Kehoe*, 516 F.2d 78, 86 (3rd Cir. 1975), *cert denied*, — U.S. —, 96 S. Ct. 1103 (1976). On the other hand, if defendant failed to utilize Harris' apparent inconsistent statement (App. p. 107) out of inadvertence or negligence, defendant should not now benefit from that negligence.

The Government submits that defendant's conduct in pursuing his motion to dismiss together with his misuse of the alleged prior inconsistent statement are the functional equivalent of an implied consent to the granting of a mistrial by the trial court. It is clear that where there is no express consent, consent "may be implied from the totality of circumstances attendant on a declaration of a mistrial". *United States* v. *Goldstein*, 479 F.2d 1061, 1067 (2d Cir. 1973). The third factor which should be considered by this Court in this regard is defendant's failure to assert to the trial judge his desire to have the matter determined by the impanelled jury, if such was the case. Failure to object to the declaration of a mistrial has been determined by this Court to be one of the probative factors from which consent may be implied in double jeopardy questions. *United States* v. *Goldstein*, *supra*, at 1067 fn. 11.

The Government contends that when the totality of the circumstances attendant on the declaration of the mistrial in the present case are examined, it is clear that defendant, by his conduct, impliedly consented to the declaration of a mistrial.

CONCLUSION

For all of the foregoing reasons, the Government submits that the defendant impliedly consented to the declaration of a mistrial by the trial court, and even if defendant did not consent to the declaration of a mistrial, the trial judge acted within the permissible bounds of his discretion. It is respectfully urged that the decision of the District Court dismissing this indictment be reversed.

Respectfully submitted,

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United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 76-1284

UNITED STATES OF AMERICA
Appellant

v,

SYLVIO J. GRASSO
Appellee

AFFIDAVIT OF SERVICE BY MAIL

Albert Sensale, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 914 Brooklyn Ave Brooklyn, N.Y.

That on the 27th day of August, 1976, deponent served the within Brief and Appendix for Appellant upon Henry Rothblatt, Esq., 232 West End Ave, New York, N.Y. 10023 Frank S. Berall, Esq., 60 Washington St., Hartford, Connectiuct, 06106

Attorney(s) for the Appellee in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Albert Sensale

Sworn to before me,

This 27th day of August 1976

SHIRLEY AMAKER
Notary Public, State of New York
No. 24 - 4502766
Qualified in Kings County
Commission Expires March 30, 1977